## **United States Government** National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: October 16, 2008

TO : Richard L. Ahearn, Regional Director

Region 19

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: NRC Environmental Services 385-7501-2577

and NRC National Response 385-7533-2000 Cases 19-CA-31215, 31227, 385-7533-2020 385-7533-2060

31249, 31251, 31250, 31335

420-1227 440-6701

This case was submitted for advice as to whether the Employer's newly hired vessel operators and deckhands are unit members based on the work they perform where, as here, the parties' collective-bargaining agreement defines the unit based on work performed. We conclude that the vessel operators and deckhands are unit members because they are performing work that falls within the unit description in the collective-bargaining agreement, and the unit work is not an insignificant part of or merely incidental to the functions that the vessel operators and deckhands perform. 1

## FACTS

Crowley Environmental began operating in around 1992 as strictly a marine-based operation providing worldwide oil spill response, and emergency and crisis management. The company was acquired by Foss Environmental Services in around 1995, and by the current owner, NRC (the Employer), in 2003. Over time, the company had lost a number of its marine service contracts and since about 1995, it began doing more land-based environmental service work as its marine-based environmental service work diminished.

Since 1993, the Inlandboatmen's Union of the Pacific (the Union) has represented the technicians who perform the Employer's marine and land-based industrial services and emergency response work. The Union negotiated numerous

 $<sup>^{1}</sup>$  The Region has determined that if there was an expansion of the certified unit to include the new employees, it would issue complaint alleging that the Employer's subsequent withdrawal of recognition and contract repudiation, as well as other 8(a)(1) and 8(a)(5) allegations that are derivative of that conduct, were unlawful. The warrant for 10(j) relief will be addressed in a separate memorandum.

collective-bargaining agreements with the Employer and its predecessors, including the most recent contract that ran from 2005 through April 2008. From the inception of the collective-bargaining relationship, the Union has represented all "employees as classified herein," as described in Article 1.3 of the contract:

Except for otherwise provided in this Agreement, bargaining unit personnel will be utilized for technicians work before any non-bargaining unit personnel are utilized. Technicians are defined as employees who (1) have the requisite job skills as determined by the Employer for the technician job classifications, and (2) are used as environmental technicians in the clean-up or prevention of potential environmental hazards by the Employer, in both emergency response situations and during the course of daily business (including the repair inventory, checking, and exercising of equipment).

The current Employer has maintained the same marine and land-based operation as its predecessors. Prior to October 2007, 2 its land-based work has included such environmental services as soil remediation, site cleaning, and hazardous waste management. Its industrial services included the operation of vacuum trucks to transport waste to disposal sites, above ground tank cleaning, and land-based emergency responses. Its marine services included providing containment booms to contain debris during marine construction and emergency response services related to marine oil spills.

The Employer has used bargaining unit technicians for all of this work, but they have primarily performed the land-based nonemergency work. In addition, the Employer developed a standby list of non-unit employees to meet the demand of doing emergency response work for the State of Washington.

Over the years, bargaining unit technicians have operated the various marine vessels utilized in oil spill work, including skimmers and response vessels, and laid booms, for example, during bilge cleanup.<sup>3</sup> During this operation, technicians were on standby in case of a spill.

<sup>&</sup>lt;sup>2</sup> Hereafter, all dates are in 2007 unless otherwise noted.

<sup>&</sup>lt;sup>3</sup> The bilge is the bottom section of a vessel between the bottom plate and the lowest deck of a vessel.

If a spill occurred, a group of technicians would mount a vessel and deploy a boom to contain the spill. $^4$ 

During the parties' negotiations for the most recent contract, they were aware that the State of Washington was likely to change its environmental regulations concerning fuel transfers. They expected the state would require prebooming work, such that whenever a transfer of oil occurred over water, the vessel transferring the oil would be protected from any potential spill. The parties further expected that the Employer's operation would expand and require an increase in the number of full time technicians to perform the pre-booming work. In anticipation of this new state regulation, by the beginning of October, the Employer recruited approximately 150 vessel operators and deckhands, placed 24 on new pre-booming jobs, and the rest on the standby list.

On October 26, the state's new "Vessel oil transfer advance notice and containment requirements" took effect. The regulation states in pertinent part:

In order to [pre-boom] transfers . . . The deliverer must deploy the boom such that it completely surrounds the vessel(s) and facility/terminal dock area directly involved in the oil transfer operation, or the portion of the vessel and transfer area that provides for maximum containment of any oil spilled.

The evidence obtained by the Region disclosed that the pre-booming work is essentially the same as the regular booming work. The pre-booming is preventive and takes place before a spill occurs, whereas the regular booming is part of the cleanup and containment process. The employees performing the pre-booming work store their booms at various marinas or ports, whereas the regular booms are kept on the deck of a vessel. The pre-booms are larger and heavier than the regular booms and are pulled by a vessel to the targeted area, whereas the regular booms are transported on the deck of a vessel. Both pre-booming and regular booming occurs out on the water. Whereas a preboom is set up prior to an oil transfer as a preventive measure, in a marine setting the regular boom is set up for containment purposes after a spill has already occurred. In either instance, the crew uses the boom to contain the actual or potential spread of oil.

<sup>&</sup>lt;sup>4</sup> A boom is a floating petroleum barrier which varies in length and resembles a large weighted shower curtain hanging under the water with floats on top.

A former standby employee who the Employer hired as a vessel operator in October for the pre-booming assignments maintains that the regular booming work and the pre-booming work are very similar because the same boats and tools are used. When he was a standby employee, regular full-time technicians taught him how to extend the boom in responding to oil spills. In his current position, he has trained deckhands to perform their duties.

The Employer admits that in the past it assigned technicians to perform marine service work, including as vessel operators and deckhands. The Employer claims the technicians were assigned to the marine service area as vessel operators and deckhands on rare occasions, ranging anywhere from 0.3 percent to 11.3 percent of their time between 2005 and 2008.

## ACTION

We conclude that the newly hired vessel operators and deckhands are unit members because they perform work that falls within the unit description in the collective-bargaining agreement, and that unit work is not an insignificant part of or merely incidental to the functions that the vessel operators and deckhands perform.

The Board held in The Sun<sup>5</sup> that where a bargaining unit is defined by the work performed, it will presume that new employees should be added to the unit if the new employees perform job functions similar to those performed by unit members, as defined in the unit description, unless the unit functions are "merely incidental to their primary function or otherwise an insignificant part of their work." The Board further held that the party urging the exclusion of the new employees from the unit has the burden to show that the employees are "sufficiently dissimilar from the unit employees" such that to include them in the unit would cause it to be "no longer appropriate." The Board considers community-of-interest factors that relate to changes in the nature and structure of the work in determining whether the presumption has been rebutted.

<sup>&</sup>lt;sup>5</sup> 329 NLRB 854, 859 (1999).

<sup>&</sup>lt;sup>6</sup> Id. at 859.

<sup>&</sup>lt;sup>7</sup> Ibid.

<sup>&</sup>lt;sup>8</sup> Ibid.

Here, pursuant to Article 1.3 in the contract, the parties have defined the unit as being work done by technicians who have the job skills as determined by the Employer and "are used in the clean-up or prevention of potential environmental hazards by the Employer, in both emergency response situations and during the course of daily business . . . " Thus, since the unit description in the contract describes the work to be performed, The Sun requires a determination of whether the work performed by the newly hired vessel operators and deckhands is within that unit description.

We conclude that the pre-booming work performed by those newly hired employees falls within the unit description. First, the work falls squarely within the literal description of the unit: it is environmental work, preventive in nature, and performed in the course of the Employer's daily business. The Employer hired the vessel operators and deckhands for pre-booming work in October because it anticipated increased work as a result of the new state environmental regulation requiring preventive containment procedures during oil transfers over water. Thus, the pre-booming work performed by the newly hired vessel operators and deckhands is functionally equivalent to the work described in the contract.

Second, the booming work performed by "pre-booming" employees is actually work historically performed by unit employees. Since the Employer and its predecessors began operations, the Union has represented a unit of technicians who have performed marine services and emergency response work. Over the years, the technicians have operated the various vessels utilized in oil spill work and have deployed booms to contain the spills. For example, technicians were on standby during bilge cleanup in case of a spill. If a spill occurred, a group of technicians would mount a vessel and deploy a boom to contain the spill. More recently, but prior to the hiring of the new employees, the Employer's marine services involved construction oriented events requiring containment booms to contain debris during construction. Indeed, the Employer acknowledges that technicians historically have performed at least a small percentage of work as vessel operators and deckhands. Finally, the evidence also disclosed that the equipment, vessels, and work procedures used in the current pre-booming operations is essentially the same as the technicians historically have used to perform marine service work. Thus, laying a boom is still laying a boom regardless of whether it is performed in response to a spill or as a preventive measure. The only substantive distinction is that work once performed on an emergency

basis has now become a part of the Employer's daily business.

Finally, the work that the new employees are doing is not an insignificant part of or merely an incidental part of their function. Rather, the pre-booming work is the new employees' primary work function. There is no dispute that the new employees were hired for the sole purpose of doing the Employer's expanded marine-based work resulting from the new state regulation. Therefore, because the parties' collective-bargaining agreement defines the work to be performed and the new employees are performing that work, we conclude that pursuant to the presumption set forth in The Sun, the new employees are part of the bargaining unit unless the Employer can rebut the presumption.

Under The Sun analysis, the Employer can rebut the presumption by showing that adding the new employees to the unit would cause the unit to be inappropriate. The Employer maintains that the pre-booming employees do not share a sufficient community of interest with the unit employees because the pre-booming employees have different supervision and work locations from, and no interchange with, the technicians. However, the Board has held that it would not rely on community-of-interest factors for rebuttal when they are solely within the Employer's control. 11

We also reject the Employer's assertions that vessel operators and deckhands should not be included in the unit because those classifications are not explicitly covered by the contract and because it has not historically done the pre-booming work. Although the contract only names one classification of work, i.e. technician, it does describe

 $<sup>^9</sup>$  See <u>The Sun</u>, 329 NLRB at 859, where the Board states that the "insignificant or merely an incidental part of their function" portion of the test applies to the employees being considered as an addition to the unit.

<sup>&</sup>lt;sup>10</sup> The Employer has argued that an accretion analysis should be applied. However, the Board rejected a similar contention in <u>The Sun</u>, clarifying that an accretion analysis is not appropriate when, as here, the bargaining unit is functionally defined by the work performed. Id. at 860.

<sup>11</sup> Id. at 859. As to differing work locations raised by the Employer here, we note that the Employer solely controls which technicians work in marine areas and which work on land.

the function of that work classification in Article 1.3. That contract clause defines bargaining unit work as "work preformed by technicians who are used as environmental technicians in the . . . prevention of potential environmental hazards . . . in the course of daily business." Since, as shown above, the vessel operators and deckhands perform the same work that technicians have performed, and the function of that work is defined in the contract, they belong in the unit. 12

Accordingly, we conclude that under the standard set forth in <a href="The Sun">The Sun</a>, the pre-booming vessel operators and deckhands are performing work within the unit description that is not an insignificant or incidental part of their functions. We further conclude that contrary to the Employer's contentions, the inclusion of the new vessel operators and deckhands in the unit would not destroy its appropriateness.

B.J.K.

12 See <u>Tarmac America</u>, <u>Inc.</u>, 342 NLRB 1049, 1050 (2004) (although employer created a new position of "yard person," it was clear that the position belonged in the unit of forklift operators since the "yard person" was performing essentially the same work as the forklift operators).